JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 598.

BUTTE & SUPERIOR COPPER COMPANY, LIMITED,
A CORPORATION,
(Defendant) Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, A CORPORATION, AND ELM ORLU MINING COMPANY, A CORPORATION,
(Plaintiffs) Appellees.

REPLY BRIEF ON PRIORITY FOR APPELLANT, BUTTE & SUPERIOR COPPER COMPANY, LIMITED.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1916.

Sloss & Hinshaw Cotton Company, Limited, a Corporation,
(Defendant) Appellant,

vs.

Clam-Mortuus Realty Company, a Corporation, and Elk Only Mining Company, a Corporation,
(Plaintiffs) Appellees.

REPLY BRIEF OF PLAINTIFFS AND APPELLEES, SLOSS & HINSHAW COTTON COMPANY, LIMITED.

Of so much of Appellees' brief in this Court as relates to priority, but three features require consideration. This reply is limited to them.

1.

The findings of the lower courts.

Appellees (herein called "Plaintiffs") urge that Elk Only priority of location was found by each the trial Court and the Circuit Court of Appeals (Sloss brief in this Court, p. 11).

As to the Circuit Court of Appeals.—The extract from the opinion of that court quoted by plaintiffs cannot improve their position on the facts as found by the trial Court, and for these reasons:

(*a*) The former court had no thought of finding facts additional to those found by the trial Court. The quoted extract is found in a paragraph dealing with the assignment of error on the part of the trial Court in finding that the Elm Orlu had priority of location. It immediately follows a verbatim copy of the findings and conclusions of the trial court—which are themselves preceded by these statements:

> "The court below upon the issues and testimony found the following facts", and
> "From the findings the court deduced the following conclusion of law".

The date used by the Circuit Court of Appeals in its recital of discovery and marking of the Elm Orlu is the date alleged in the plaintiff's complaint as well as the date of location declared in the notice, Exhibit A to the complaint (Record, pp. 11 and 12). These allegations were denied. The trial Court's finding was of a discovery and marking "at least in 1876". The evidence would not have supported an earlier finding as to the marking, and the Circuit Court of Appeals did not refer to either the trial Court's finding or the evidence in that regard.

The Circuit Court of Appeals considered but one feature, the issue of law as to the validity and effect of the notice of location. It mistakenly assumed that the date of discovery and marking of

the Elm Orlu was admitted, as was the date of location of the Black Rock.

(*b*) There was no admission of the alleged date of discovery and marking of the Elm Orlu, nor did the trial Court find that the date alleged (April 18) was the actual date. The earliest date found by the trial Court was 1876. If the Circuit Court of Appeals had undertaken to find April 1875 as an additional finding or a finding in opposition to the trial Court, as the actual date, such a finding must have rested on presumption alone, there being no evidence to support it.

(*c*) There was no cross-appeal by plaintiffs. Therefore the Circuit Court of Appeals could not have made additional findings without request by either side and upon defendant's objection to specific findings only.

As to the Trial Court.—Priority of location was a conclusion of mixed fact and law. Either the trial Court related the later discovery and marking back to the record of April, 1875, or else it treated the later Elm Orlu patent as conclusively validating the Elm Orlu location as of the date named in that record.

The facts were undisputed, consisting of the notices of location alleged by plaintiffs, the testimony of plaintiffs' own witnesses as to each the Elm Orlu and the Black Rock, and plaintiffs' own allegations as to the location of the latter.

The situation is just as it would have been if the facts had been submitted upon an agreed statement. The inquiry then would have been, as it now is, What consequences as to priority does the law demand? Such must be the inquiry unless the

law is to be disregarded. We have undertaken to show in our earlier brief that there never could be but one correct answer to this inquiry, and that the law demanded a conclusion of priority of mining rights in favor of the Black Rock.

II.

The Montana Decisions.

Plaintiffs urge that the "Hickey" case (33 Mont. 46) stands alone and is "out of harmony" with all other decisions, even those in Montana (their brief, this Court, pp. 22, 23).

We Answer:

(*a*) The Montana Supreme Court in the "Hickey" case put itself in harmony with this Court; and

(*b*) It later affirmed the rule of the "Hickey" case in the "Junila" case (43 Mont. 978).

(*a*) We attach as Schedule "A" an analysis of the Montana decisions and of certain decisions of this Court down to July 24, 1905, the date of the decision in the "Hickey" case. Summarized, that analysis shows that:

Ignoring *Deffeback* v. *Hawke*, 115 U. S. 392 (decided November 16, 1885) the Supreme Court of Montana at its January, 1896, term in *Talbot* v. *King* (6 Mont. 102) and again at its January term, 1887, in *King* v. *Thomas* and other cases covered in the same decision (6 Mont. 409)—all dealing with the Smokehouse Lode—went to the limit of holding that a lode patent concluded all

inquiry into any earlier fact or even the date of its happening. No review of these cases was ever sought in this Court. The controversy was between the Butte Townsite patent (applied for in June, 1876, entered July, 1876, and issued September 26, 1877) and the Smokehouse Lode (whose location date as declared in the notice of location accompanying its application for patent was April 16, 1875, and whose patent was issued on March 15, 1881).

Having held that the townsite entry and patent did not and could not gain or pass any mineral rights (6 Mont. 402-406), the Montana court might logically have disposed of those cases by ruling that there was no segregation of such rights until the lode patent entry, and that therefore the townsite patent was not a prior or intervening mineral right. Such a ruling would have been in line with the later decisions of this Court in the "Ajax" case (182 U. S. 497) as interpreted in the "Creede" case (196 U. S. 353), all of which is explained in our earlier brief on the merits (pp. 28-60). That Court, however, chose to make the broad ruling as above. Later the question was brought to this Court through the Supreme Court of Montana, in *Davis* v. *Weibbold,* 7 Mont. 107. In that case the controversy was between the same townsite patent and the Gold Hill Lode (entered September 19, 1878, and patented January 15, 1880). In a six-line opinion rendered July 23, 1887, that Court said:

> "It is conceded that the questions for review in this case are identical with those heretofore decided by this court in the case of *King* v. *Thomas,* 6 Mont. 409. Accordingly, and on the authority of that case, the judgment and order * * * are affirmed".

That decision of the Supreme Court of Montana was reversed by this Court (139 U. S. 507). This Court ruled that a townsite patent carried mineral rights not "known" at the time of the townsite entry, and that the offered evidence of no known mineral excluded by the Montana courts upon authority of their previous decisions in the Smokehouse Cases, should have been received against the Gold Hill patent. Upon that point, this Court said (p. 527):

> "That proof was excluded on the ground that the mining patent * * * established that the premises contained valuable minerals. Such was the effect of the patent, if there was any jurisdiction in the Land Department to issue a mining patent at all under the circumstances of this case * * *. The plaintiff not having offered any proof upon this point, but having relied upon the fact as a matter of presumption merely, the defendant should have been permitted to establish the negative of it * * * We think the court erred in excluding the proof of the defendant".

Of the earlier Smokehouse decisions of the Supreme Court of Montana, this Court said (p. 530):

> "The mining claim patented had been located and the rights of the mining claimant had thus attached before the Townsite patent was issued. The patent which subsequently followed was a mere perfection of the right originated by the location and to which it took effect by relation. It was held, in accordance with this opinion, that the prior mining location was not affected by the townsite entry."

It is apparent that this Court, ignoring the offer made in the "Talbott" case to prove no discovery and no marking of the Smokehouse Lode, assumed

an earlier valid location segregating mineral rights before the Townsite entry. Upon that assumption only it justified those decisions and would not have justified them otherwise. So it was that four years after the delivery of the state decisions in the "Smokehouse" cases, this Court reversed and declared against the broad rule as to conclusiveness of patents announced. Later, in *Hussman* v. *Durham,* 165 U. S. 148 (1897), this Court declared its view more explicitly limiting the backward relation of the conclusive effect of a patent to the date "of the inception of the equitable right".

Then came the "Ajax" case in 1901 (182 U. S. 499); followed four years later (in January, 1905) by both the "Baker" case (196 U. S. 119) and the "Creede" case (196 U. S. 337). In the "Baker" case this Court held that the Montana statute requiring, among things verification of notice, was constitutional and (at least in other respects) mandatory. In the "Creede" case it explained and limited the Ajax case, so as to leave open against a mining patent and in favor of alleged adverse pre-patent rights, full inquiry regarding the date of location and necessarily of acts essential to constitute such a location up to or near to the date of the patent entry in the land office. It further ruled that a patent holder claiming the benefit of relation to a date before the patent entry, must affirmatively prove the essential facts independent of the patent.

Such was the situation when, five months later, the Supreme Court of Montana was called upon to decide the "Hickey" case. This Court, in *Davis* v. *Weibbold,* had followed and applied *Deffeback* v. *Hawke.* The latter case was cited in the brief of the prevailing counsel to the Montana Supreme Court in the "Hickey" case, and in its opinion in

that case, that Court relied in part on the "Baker" case.

Unless the Supreme Court of Montana wished to entrench itself in error and to defy this Court, what other decision could it have rendered in the "Hickey" case?

(*b*) The later decision of this Court in the "Lawson" case (207 U. S. 1) (Oct. 21, 1907) did not affect the rule of the "Creede" case. Therefore, the Supreme Court of Montana properly affirmed the "Hickey" case in the "Junila" case decided after the "Lawson" case.

III.

Failure to Adverse.

To relieve themselves of the consequence of their failure to adverse the Black Rock application, plaintiffs now urge to this Court that there is no evidence that the locators of the Elm Orlu, or the then owners, knew of the conflict of surface claimed by the Black Rock, and that this is a sufficient explanation of the failure to adverse.

We Answer:

(*a*) The publication of notice of an application for patent, with its surveyed description, is like the publication of summons to quiet title. Persons affected may not afterwards say that they did not know the boundaries or whereabouts of the area applied for.

(*b*) Plaintiffs admit that they knew, because their 1882 application, as appeared from the allega-

tion in their complaint, describes just what remained exclusive of the conflict, and by surveyed description itself tied to the patent survey of the Black Rock.

(*c*) Plaintiffs allege in their complaint that by June 1, 1880, their predecessors "abandoned" an area, describing it by metes and bounds, identical with the conflict area. Abandonment is always a purposed and intentional act.

Though not obliged to adverse, plaintiffs by the Black Rock application were confronted with the necessity of either adversing or suffering the consequences of a failure to do so. Such consequences ensue from a failure to heed the published notice of application for patent just as from a failure to heed a published summons. What those consequences were we have already pointed out in our earlier brief.

Associate Justice Brewer, who wrote the opinions in the "Baker", "Creede", and Lawson cases in this Court, when sitting on circuit in *Wight* v. *Dubois,* 21 Fed. 693, 695, 696, said:

> "Unless * * * equitable reasons exist * * * he who fails to adverse until the expiration of publication *is absolutely cut off, and cannot be heard to say that he has prior rights.* * * *
>
> "The right to protect is not the right to contest. The latter is lost by the failure to adverse." (Italics ours.)

Analyzing the latter case and the decision of Mr. Justice Brewer, the Supreme Court of Colorado in *Hunt* v. *Eureka English Min. Co.,* 14 Col. 451, said:

> "In *Wight* v. *DuBois,* 21 Fed. 693, Judge BREWER, adopting the construction of these provisions, announced by Judge HALLETT in

the same case, sums in brief his conclusions (p. 696):

"(1) The government, as a land owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and the purchaser alone, and with which no stranger to the title can interfere.

"(2) Publication of notice is process, bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land.

"(3) Thereafter the only right or privilege remaining to any party is that of protest or objection, filed with the Land Department and cognizable only there."

This Court, itself, in *Richmond Min. Co.* v. *Rose*, 114 U. S. 576, 584, has said:

"Looking at the scheme which this statute (paragraphs 23-25, 23-26, U. S. Rev. Stats.) presents and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance, where there was a possibility of one of these claims conflicting with another, to give opportunity to have the conflict decided by a judicial tribunal, before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent, when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the rights of the parties under instruction, as to the law, from the Court."

In *Golden Reward Min. Co.* v. *Buxton Min. Co.*, 79 Fed. 868, 873, the Court said:

> "With reference to the proceedings in the land office, the publication of the proper notice for the prescribed period is due process of law. The proceeding is judicial in its character and in the nature of a proceeding *in rem*. If there is no adverse claim, a decision of the land office, awarding the patent, is a judgment by default, as conclusive as to the matter adjudicated, as a judgment upon contested issues. The expression 'it shall be assumed,' must be construed to mean 'conclusively assumed,' as any other construction would defeat the object of the statute. In using the word 'conclusively' I do not mean to say that the statute has closed the doors of a court of equity to adverse claimants in every case; but I think it may safely be asserted that the failure to adverse, as provided by the section referred to, deprives the adverse claimant of all remedies except those which a court of equity might show to be urged against a judgment of law.
> * * *
>
> "Laying aside the question of fraud, as limited and defined in the cases cited, it is settled that the action of the Land Department, in issuing a patent, is conclusive upon questions of fact coming properly within the scope of its jurisdiction. It is not subject to review by any other tribunal."

Mr. Lindley, in the Third Edition of his work on mines, Sec. 742, says:

> "Where there is any surface conflict whatever and there is a failure to adverse, the issuance of the patent operates as a conclusive determination of priority in favor of the patentee as to the conflict area. To what extent this determination affects the question of

> underground rights, in cases involving extra lateral right planes on segments of the vein lying outside of the vertical boundaries of the conflicting area, has been discussed and differently decided in different courts."

See also

Gwillim v. *Donnellan,* 115 U. S. 45, 48, 50.
Iron-Silver Mining Co. v. *Campbell,* 135 U. S. 286.
Neilson v. *Champaign Min. & Mill Co.,* 119 Fed. 123.
Stark v. *Starr,* 6 Wall. 418.
Girard v. *Carson,* 22 Col. 345.
Seymour v. *Fisher,* 16 Colo. 188.
Nesbit v. *DeLamar's Nevada Gold Min. Co.,* 24 Nev. 273.

Such has been the invariable rule of decision in the Land Department.

In *American C. M. & M. Co.* v. *Dewitt,* 26 L. D. 580-1, it was said:

> "Whether the ground which includes the Maryland discovery is a part of the Maryland or part of the Orbit, or whether the Maryland is the *superior claim to the ground in conflict,* are questions which were open to determination or adverse proceedings in the local court and which are now determined adversely to protestant's contention by reason of its failure to adverse the Maryland application." (Italics ours.)

See also

Whitman v. *Haltenhoff,* 19 L. D. 245-7.
Mutual M. & M. Co. v. *Currency Co.,* 27 L. D. 191-3.
Stranger Lode, 28 L. D. 321-5.

Concluding this feature, we earnestly urge this point: That whenever the application for patent by

the assertion of right to conflicting surface, the lack of dealings between the parties and the lack of improvements or actual occupancy of the conflicting ground, makes the right to the conflicting area turn upon the question of priority, such priority is the only issue to be adjudicated, and is adjudicated as well by a failure to adverse as it would be by an adverse, a suit brought thereunder, and a judgment determining the question; further, that there can be but one priority as between two locations, and that when that feature of priority has thus been determined, either by judgment under adverse or by default through failure to adverse, the judicial effect of that determination is as strong in its operation upon other surface and upon extra lateral rights appurtenant to the superior location as it is upon the specific surface involved. In other words, as already stated in our earlier brief, there cannot be two different sets of priorities in the same location, and the determination of priority as to one portion of a location necessarily determines the question of priority as to all the balance of the location.

It is respectfully submitted that the decree should be reversed in manner as outlined in our additional brief on the merits.

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January, 1919.

SCHEDULE "A".

Analysis of Montana Decisions.

The Smokehouse cases.

Talbott v. *King* (6 Mont. 103-4).
King v. *Thomas and other cases* (6 Mont. 397).

Talbott case. Decided: January Term, 1886.
King and other cases. Decided: January Term, 1887.
Date of location of Smokehouse lode: April 16, 1875.
Date of Smokehouse patent: March 15, 1881.
Date of townsite patent: September 26, 1877.
Application date: June, 1876.
Final entry: July, 1876.

Held, that townsite patent could not and did not pass any mineral rights (102 and 408). Under this ruling, it could not be an intervening right hostile to a mining right and to which, for the purpose of extra-lateral right or otherwise, the mining right would be subordinated. The effect of permitting an attack on the mining location under such circumstances would be to destroy the mining patent. These cases were really within the rule of the later *Ajax* and *McKnight* cases in this court, though the reasoning of the Supreme Court of Montana was in disregard of that feature. None of these cases were taken to the Supreme Court.

Chambers v. *Jones,* October Term, 1895 (17 Mont. 156). This case merely affirms the Smokehouse cases. The Arctic lode was located March 23, 1877, and patented March 15, 1883, the location

being anterior to and the patent subsequent to the townsite application entry and patent.

Davis v. *Weibbold,* 7 Mont. 107, decided July 23, 1887. The whole opinion reads:

> "It is conceded that the questions for review in this case are identical with those heretofore decided by this court in the case of *King* v. *Thomas* (6 Mont. 409). Accordingly, and on the authority of that case, the judgment and order * * * are affirmed."

Davis v. *Weibbold,* 139 U. S. 507.

Date of decision: April 6, 1891.

Disposition: Reversed the Supreme Court of Montana.

Gold Hill Lode:

Date of entry: September 19, 1878.

Date of patent: January 15, 1880.

The Butte Townsite patent was involved as in the Smokehouse cases. The townsite claimant offered to prove that on September 26, 1877, the date of issue of the townsite patent, the Gold Hill premises were not known to be valuable for mineral. The proof was excluded by the State court on the ground that the lode patent conclusively settled that fact. The United States Supreme Court held the patent not conclusive, and that the evidence offered should have been received against the mineral patent. This court said (526):

> "It is not necessary in this case to state in what manner it must be shown that the existence of mines was known at the time the patent for the townsite was issued. If the mining patent states any initiatory steps in acquiring title which antedate the title of the townsite, they may suffice in an action at law. In the

absence of such statement, the development and working of a mine would be a controlling fact; so also perhaps would be the location of the claim patented, and notice thereof required by law, or the custom of miners. But in this case the patent does not show any such initiatory steps; it merely refers to the entry * * * and that was after the patent was issued to the townsite. No proof was offered to show when the mining claim was originally located."

Of the rejected proof this court expresses itself as quoted in this brief. It further adds (528):

"They (the mining laws of Congress) do not provide and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of private individuals can be patented under any proceedings before the Land Department or otherwise."

Speaking of conclusiveness of mineral patents, this court said (529):

"They are conclusive in such actions (at law) of all matters of fact necessary to their issue * * *; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void."

Baker v. *Butte City Water Co.*, 196 U. S. 119.

Decided January 3, 1905. Disposition: Affirmed the decision of Supreme Court of Montana. For details see our additional brief on merits in this court, Schedule A, page 57.

Calhoun Gold Mining Co. v. *Ajax Gold Mining Co.*, 182 U. S. 499.

Decided April 27, 1901. Disposition: Affirmed. For details see our additional brief on merits, this court, pages 57 and 58.

Creede, etc. v. *Uinta, etc.*, 196 U. S. 337.

Decided: January 30, 1905. Disposition: Affirmed. For details see our additional brief, this court, pages 58 to 61.

Hickey v. *Anaconda Copper Mining Co.*, 33 Mont. 46.

Decided: July 24, 1905. Disposition: Reversed. For details see our additional brief, this court, page 57.